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No. 34

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, INTERVENOR,
PETITIONER

v.

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, LTD., AND SUNNYLAND WHOLESALE FURNITURE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 642

UNITED STATES OF AMERICA, INTERVENOR, PETITIONER

v.

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, LTD., AND SUNNYLAND WHOLESALE FURNITURE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (R. 53–57) is reported at 107 F. Supp. 405. The majority and dissenting opinions in the Court of Appeals (R. 83–93) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals (R. 93) was entered December 22, 1953. The juris-

diction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether certain tax liens held by the United States were subordinate to an inchoate attachment-before-judgment lien accorded by state law to the plaintiff in a civil action, where the federal tax liens arose and were recorded subsequent to the attachment but prior to the entry of judgment in the civil case.

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code and of the Texas Civil Statutes are printed in the Appendix, *infra*, pp. 10–13.

STATEMENT

The material facts may be summarized as follows:[1]

On March 8, 1952, fire destroyed certain property of D. Ray Adams (hereafter sometimes referred to as the "taxpayer"), doing business as Adams Furniture & Hardware Company at Temple, Texas. The loss was covered by fire insurance policies issued by Liverpool & London & Globe Insurance Company, Ltd., and another company. Adjusters for the insurance companies determined the extent of the loss to be $15,153.06, each com-

[1] The District Court made no findings of fact. The material facts are summarized in the opinion of the Court of Appeals, and are not in controversy.

pany agreeing to pay one-half of the liability. (R. 21–22, 84.)

On April 8, 1952, and prior to the payment of the insurance proceeds, the Sunnyland Wholesale Furniture Company filed suit on sworn accounts against the taxpayer in the District Court of Dallas County, Texas, to obtain a judgment in the amount of $2,329.27. At the same time a writ of garnishment was issued and served upon the Liverpool insurance company, attaching the insurance funds pending the lawsuit. (R. 22, 84.)

On April 18, 1952, during the pendency of the lawsuit against the taxpayer, the Commissioner made assessments against the taxpayer and his wife covering income taxes for 1948 to 1950, inclusive. The assessment lists were received in the Collector's office on April 21, 1952, and on April 26, 1952, a notice of tax lien was filed in the office of the County Clerk of Bell County, Texas, in favor of the United States in the sum of $10,417.57, plus interest. (R. 25, 27, 84.[2]) Thereafter, the Acting Collector served on the insurer a copy of the notice of tax lien, together with

[2] Previously, in December of 1951 and February of 1952, federal withholding taxes totaling $2,520.05 were assessed against the taxpayer, notice of tax lien in that amount was filed on March 25, 1952, and warrants of distraint covering these taxes were issued on April 7, 1952. (R. 26.) It was admitted below that the federal lien for these taxes is superior to the later attachment lien (R. 86), and accordingly no issue is any longer presented with respect to these taxes.

warrants of distraint and notice of levy in the amount of $10,469.96. (R. 22, 84.)

Judgment was entered against taxpayer and in favor of Sunnyland Wholesale Furniture Company in the state court proceeding on June 20, 1952, in the sum of $2,516.07, plus interest and costs. (R. 76–77.)

The present proceeding is an outgrowth of the state court garnishment proceeding instituted by Sunnyland Wholesale Furniture Company. By an amendment to its answer therein the garnishee insurance company named the United States as an additional party defendant, and requested a determination of the relative priorities of the claims of the garnishor and of the United States. It also requested that it be granted a reasonable attorney's fee. The amendment was allowed and process issued commanding the United States to appear and answer in the state court. (R. 6–14.) On petition of the United States (R. 3–6), the cause was removed to the District Court for the Northern District of Texas, and the United States was dismissed as a party-defendant and allowed to intervene as party-plaintiff for the purpose of foreclosing its liens for unpaid federal taxes (R. 18–28). The insurance company filed responsive pleadings in which it tendered its loss draft in the sum of $7,500.39 into the registry of the court, and prayed for an order determining the rights of the parties therein, and also for a reasonable attorney's fee in the sum of $500. (R. 30–41.)

The District Court held that the Sunnyland Wholesale Furniture Company, by virtue of its writ of garnishment, had a lien on the funds on deposit in the registry of the court which was superior to the tax liens of the United States. The District Court also awarded an attorney's fee of $500 payable to counsel for the insurance company out of the funds on deposit. (R. 50–57.) The Court of Appeals affirmed, one judge dissenting. (R. 83–93.)

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in holding that the inchoate attachment lien obtained by Sunnyland Wholesale Furniture Company under the laws of Texas was superior to the liens of the United States for unpaid taxes.

2. The court below erred in awarding attorney's fees payable to counsel for the garnishee out of funds impressed with a lien for unpaid taxes due the United States.

REASONS FOR GRANTING THE WRIT

The question in this case is the same as that in *United States* v. *Acri, et al.*, in which the Government is simultaneously filing a petition for a writ of certiorari, No. 641. The decision below, like that of the Court of Appeals for the Sixth Circuit in the *Acri* case, is plainly contrary to this Court's decision in *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, recently reaffirmed in *United States* v. *City of New Britain*, 347 U. S. 81,

and the Government respectfully submits, for the reasons stated in the petition in No. 641, that the judgment below in this case should likewse be reviewed and reversed, without further briefs or argument.

1. The undisputed facts of this case are not distinguishable in any material respect from those in the *Security Trust* case. Here, as there, federal tax liens arose and were recorded after an attachment was made against the delinquent taxpayer's property by a plaintiff in a pending lawsuit, but before the plaintiff obtained a judgment. The attachment was made under Texas law, by issuance and service of a writ of garnishment.

The court below, while professing to be bound by the *Security Trust* case, in effect refused to accept it as controlling. It held the garnishment lien to be superior to the federal tax liens, notwithstanding that it had not yet ripened into a judgment lien, on the theory (R. 89) that it became "specific and perfected under Texas law" before the federal liens arose. Examination of the relevant provisions of the Texas statute shows that the Texas attachment lien here involved was no more choate than the California attachment lien involved in the *Security Trust* case. It was entirely contingent upon the procuring of a judgment by the plaintiff-garnishor. See Vernon's Texas Civil Statutes (1925 rev.), Articles 300, 301, 4076, 4084 (Appen-

dix, *infra*, pp. 11–13). Furthermore, while the effect of an adverse lien in relation to a federal tax lien always presents a question of federal law (*United States* v. *Security Trust & Savings Bank, supra; United States* v. *City of New Britain, supra; United States* v. *Gilbert Associates*, 345 U. S. 361), even the Texas courts view enforcement of a garnishment lien created by Texas law as conditional upon the procuring of a judgment.[3]

The important consideration here, as in the *Security Trust* case, is that (p. 50) "When the tax liens of the United States were recorded, [the plaintiff] did not have a judgment lien. He had a mere 'caveat of a more perfect lien to come.'" The majority of the court below treated the inchoate attachment lien as perfected on the date the writ of garnishment was served by relating the subsequently obtained judgment lien back to the date of the attachment—a process of judicial reasoning which this Court in *Security Trust* (p. 50) rejected as contrary to "the realities of

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[3] *New Amsterdam Casualty Co.* v. *Keith*, 273 S. W. 836, 837–838 (Tex. Com. App.); *Alamo Paint & Wall Paper Co.* v. *Kampmann*, 105 S. W. 2d 492 (Tex. Civ. App.). As was stated in *Buie-Crawford Co.* v. *Cleburne Nat. Bank*, 111 S. W. 2d 830:

> We agree with appellee's contention that a valid judgment in the main suit was a prerequisite to judgment against the garnishee in the garnishment case. 20 Tex. Jur. 754; *Kelley* v. *Gibbs*, 84 Tex. 143, 19 S. W. 380, 563. It is also well settled that garnishment proceeding is ancillary to the main suit * * *.

the situation." The dissenting judge below was entirely correct, we believe, in observing (R. 93) that "If reality rather than terminology is to be the guide, the lien of this garnishment was no more specific and perfected than was the lien of the attachment in" the *Security Trust* case, and that the decision of the majority is "contrary to the decision in that case."

2. A subsidiary question in this case is whether the court below properly allowed a fee for the services of the garnishee's attorney to be paid out of the fund impressed with the federal tax liens. The majority of the court below assumed (R. 90) that the fund to which the federal liens attached could be thus invaded merely because the Texas statute authorizes an allowance to a garnishee for legal expenses incurred in connection with the garnishment proceeding. As the dissenting opinion below points out (R. 93), there is even less basis for subordinating the federal tax liens upon the taxpayer's property to the garnishee's claim for attorney's fees than to the garnishor's lien. On this issue, the decision below is manifestly erroneous.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted and the decision below reversed, without argument or further briefs, on the authority of *United States* v. *Security Trust & Savings Bank*, 340 U. S. 40, and

United States v. *City of New Britain*, decided February 1, 1954.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

MARCH 1954.

APPENDIX

Internal Revenue Code:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.
(26 U. S. C. 1946 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.
(26 U. S. C. 1946 ed., Sec. 3671.)

SEC. 3672 [as amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 505, Revenue Act of 1942, c. 619, 56 Stat. 798.] VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*— Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial Laws.*— In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to

the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

(2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

(3) *With Clerk of District Court of the United States for the District of Columbia.*—In the office of the clerk of the District Court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

* * * * *

(26 U. S. C, 1946 ed., Sec. 3672.)

1 Vernon's Texas Civil Statutes (1925 rev.):

ART. 300. Attachment creates a lien.

The execution of the writ of attachment upon any property of the defendant subject thereto, unless the writ should be quashed or otherwise vacated, shall create a lien from the date of such levy on the real estate levied on and on such personal property as remains in the hands of the attaching officer, and on the proceeds of such personal property as may have been sold.

ART. 301. Judgment and foreclosure.

Should the plaintiff recover in the suit, such attachment lien shall be foreclosed as in case of other liens, and the court shall direct the proceeds of the personal property sold to be applied to the satisfaction of the judgment, and the sale of personal property remaining in the hands of the officer

and of the real estate levied on, to satisfy the judgment. When an attachment issued from a county or justice court has been levied upon land, no order or decree foreclosing the lien thereby acquired shall be necessary, but the judgment shall briefly recite the issuance and levy of such attachment, and such recital shall be sufficient to preserve such lien. The land so attached may be sold under execution after judgment, and the sale thereof shall vest in the purchaser all the estate of the defendant in attachment in such land, at the time of the levy of such writ of attachment.

13 Vernon's Texas Civil Statutes (1925 rev.):

ART. 4076. Who may issue and when.

The clerks of the district and county courts and justices of the peace may issue writs of garnishment, returnable to their respective courts, in the following cases:

1. Where an original attachment has been issued.

2. Where the plaintiff sues for a debt and makes affidavit that such debt is just, due and unpaid, and that the defendant has not within his knowledge property in his possession within this State, subject to execution, sufficient to satisfy such debt; and that the garnishment applied for is not sued out to injure either the defendant or the garnishee.

3. Where the plaintiff has a valid, subsisting judgment and makes affidavit that the defendant has not, within his knowledge, property in his possession within this State, subject to execution, sufficient to satisfy such judgment.

ART. 4084. Effect of service of writ.

From and after the service of such writ of garnishment, it shall not be lawful for

the garnishee to pay to the defendant any debt or to deliver to him any effects; nor shall the garnishee, if an incorporated or joint stock company in which the defendant is alleged to be the owner of shares or to have an interest, permit or recognize any sale or transfer of such shares or interest; and any such payment or delivery, sale or transfer, shall be void and of no effect as to so much of said debt, effect, shares, or interest as may be necessary to satisfy the plaintiff's demand. The defendant may, at any time before judgment, replevy any effects, debts, shares, or claims of any kind seized or garnisheed, by giving bond, with two or more good and sufficient sureties to be approved by the officer who issued the writ of garnishment, payable to the plaintiff, in double the amount of the plaintiff's debt, and conditioned for the payment of any judgment that may be rendered against the said garnishee in such suit, which when properly approved shall be filed among the papers in the cause in which the suit is pending. In all proceedings in garnishment where the defendant gives bond as herein provided for, such defendant may make any defense which the defendant in garnishment could make in such suit.

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